TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 195.

FREDERICK J. LOWREY, GEORGE P. CASTLE, AND WILLIAM O. SMITH, TRUSTEES, APPELLANTS,

vs.

THE TERRITORY OF HAWAII.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED FEBRUARY 1, 1906.

(20,075.)

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1 In the Supreme Court of the Territory of Hawaii.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees, Petitioners,
v.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Amended Petition.

To the Honorable the Supreme Court of the Territory of Hawaii:

Your petitioners, Frederick J. Lowrey, George P. Castle and William O. Smith, respectfully represent that they have a claim against the Territory of Hawaii; that said claim is founded upon the statutes of this Territory hereinafter referred to and also upon the contract with the said Territory hereinafter described, and the particulars of said claim your petitioners set forth as follows:

I.

The American Board of Commissioners for Foreign Missions, hereinafter referred to as the A. B. C. F. M., for many years prior to 1850 had conducted and maintained a Protestant Mission in the Hawaiian Islands, hereinafter referred to as the Mission, and as an essential part of its missionary work carried on many schools. But its most notable educational work in said connection was centered in a school at Lahainaluna, on the Island of Maui, where
2 it possessed a large tract of land on which it had expended many thousand of dollars in the erection of buildings and other improvements, which school had at said date become a most important factor in the life and progress of the Hawaiian people, and was then the recognized leading educational institution in the Kingdom.

The course of instruction comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrines represented by the Mission.

See Exhibit "AA" being parts of the Laws of the School at Lahainaluna, as Amended and Adopted by the Mission, June 1835.

II.

The facts in regard to the title to said Lahainaluna are as follows: In 1835, the A. B. C. F. M., having established a school at the locality about 1831, the premises occupied by it were set off by the chiefs to the Mission for its purposes, whereupon important improvements were made and the school became permanent. These facts were well established before the Board of Commissioners to

quiet land titles by the evidence of Hon. William Richards, David Malo and others.

Upon the establishment of the said Board of Commissioners to quiet land titles, the claim of the A. B. C. F. M. to Lahainaluna as an established part of its system was duly presented and recognized and became "Part 5, Section 2, Lahainaluna" of claim 387.

See Vol. 2, Foreign Register, pp. (9), 12 and 26.

The evidence on which the claim was established appears in full in——

Vol. 2 of Native Testimony, p. 220.

Upon the adjudication of the claims set forth in No. 287, appears the following:

"Lahainaluna, Part 5, Section 2, claim relinquished before the Land Commission in consequence of an after-arrangement
3 having been entered into with the Hawaiian Government by the Mission." Vol. 3. L. C. Award p. 143, *et seq.*, upon the final confirmation which was duly made to the said A. B. C. F. M., all the lands claimed were awarded "with the exception of Section 2, Lahainaluna, which had been withdrawn." (Do. p. 181.)

Thus the title of the A. B. C. F. M., to the premises, and its right to an award, was clearly recognized.

III.

The "after arrangement" referred to in the records of the Land Commission was briefly as follows:

Because of financial stress and also feeling that the school which had really become a national institution, should be conducted by the Government at its own expense, in April, 1849, the Mission at its general meeting held at Honolulu, voted as follows: "To make over this seminary to the Goverment; it being understood that it is to be conducted on the same principles as heretofore."

See Minutes of the General Meeting of the Sandwich Islands Mission, held at Honolulu, April and May, 1849.

An offer was thereupon made to the Government in pursuance to this vote of the Mission to make over the school to the Government on condition that it should "be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, a summary of which will be found in the Confession of Faith herewith enclosed, and that in case of the Non-fulfillment or violation of the conditions, upon which this transfer is made, by the said Government, the whole property hereby transferred, hereinbefore specified, together with any additions of improvements—should revert to the said Mission.

4 See Exhibits A and A-1.

This offer as made was not accepted by the Government, but it instead submitted a counter offer to the Mission by which it offered to take over the school on the conditions made in the Mission's

original offer, but "provided that in case of the non-fulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishment to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the Island, or pay the sum of $15,000. to said Mission, in behalf of the Mission Board in Boston."

See Exhibits B, C, D and E.

Evidently feeling that the "Confession of Faith (Exhibit A-1) was rather loosely drawn, the Mission offered to substitute a more definite form which was accepted by the Government.

See Exhibits F. F-1 and G.

It was necessary in order that this whole arrangement should have full force, that it should be ratified, both by the Hawaiian Legislature and the Prudential Committee of the A. B. C. F. M. This was done by the passage of the act of the Legislature of July 11, 1850.

See Laws of 1850, (F. C. 1850) p. 157, sec. 1, or Civil Code, (1859) Sec. 738,

And the adoption of a resolution by the said Prudential Committee.

See Exhibit H.

IV.

The Hawaiian Government at once took possession of the Lahainaluna Seminary and carried on the school exactly as it had been conducted by the Mission, both in religious instruction and the inculcation of sound literature and solid science.

For many years after the Government had taken over the school the principals of the school continued their relations as missionaries of the A. B. C. F. M., in their work in the school and continued to make reports of their educational and religious work and instruction in the school to the general meetings of the Mission.

See Exhibit "II" and see annual reports of general meetings of the Mission.

In 1862 the seminary buildings were burned down and there was a fear that the Government would not rebuild and continue the school, but the reply came from Honolulu "Lahainaluna must be rebuilt," and it was done at once by the Board of Education.

The principal, in his report for that year, 1862-3 reviewing the history of the school, says: "The Hawaiian Government has always been a liberal friend and benefactor * * * Never in any way have they interfered with our manner of instruction, or in the course

of instruction pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who under the religious instruction at the school became ministers, he says: "While 6 who were connected with it since it has been under the care of the Hawaiian Government have been ordained to the same office."

Prior to the establishment of the Anglican Church in Hawaii, the Board of Education appointed as instructors such persons as were acceptable to the Mission, generally selecting those nominated
6 by the Mission. When the Anglican Mission was established it was proposed that the forms, and probably the substance of religious instruction in public schools, should be changed, and advice was asked of the Attorney General. Hon. Charles C. Harris in reply to the request reviews the whole arrangement, and discussing the "Confession of Faith" says: "It follows that any who teach these doctrines enumerated in the said Confession, and the remainder of whose teachings do not work adversely to those enumerated in the said "Confession," may teach in, or even direct the school." He then refers to the substitution of the Second Confession, saying that it is a much stronger instrument, and proceeds,—"and therefore if any sect of Christians teach the doctrines of each and all of those articles, they may hold the control of the school—they must * * * hold all of these points. Should the Government not be willing to keep the conditions as far as I have shown, then the property and improvements must be restored to the A. B. C. F. M.

Extract from letter of Attorney General Harris to President Board of Education, Oct. 29, 1864.

It was feared that an attempt would be made to establish a state religion and church, and comment was sharp and zealous on all acts of the Government, especially in the matters of education. The "Hawaiian Gazette" was at that time the official mouth-piece of the Government and, discussing the public schools, in the issue of June 3, 1865, there appears an editorial which contains the following:

"The Government has very properly decided that its support shall be given to schools irrespective of religious teaching, and in the native common schools it is absolutely forbidden as it has been thought more suitable that this necessary branch of education should be left to the parent and ministers of religion. At the same time
7 there is one instance in which some of our readers may imagine that the board is chargeable with partiality or supporting a state church, inasmuch as it pays a large annual sum to defray the expenses of the Seminary of Lahainaluna where the principles and theology of one particular sect are exclusively taught, although opposed to the belief of all in communion with the Roman Catholic and Episcopal Churches."

The same number of that organ contains the "Rules and Instructions to School Agents and Teachers of Government Schols," in which, Article I, "Religious instruction is strictly forbidden," thus emphasizing the difference at Lahainaluna where "the principles and theology of one sect are exclusively taught."

The following year, upon the suggestion by the Mission of certain

names as instructors, correspondence arose upon the right of the Mission to nominate. While absolutely denying the existence of such right, the Board of Education says: "It is understood that the institution is to be continued so as to aid, instead of defeating the purpose for which it was founded, and there has nothing been done to justify the intimation that the Board have any desire to defeat such purpose, or to introduce any doctrine, practice or influence antagonistic to the faith, practice and forms of worship of the founders," and definitely admitted "that a full compliance with the agreement consists in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian Churches of the United States."

Regarding the rights of the Mission, the Board of Education further says: "The Board are fully aware that if they do not see fit to carry on the institution according to the terms of the contract, they have to reconvey it, or to pay the sum of $15,000."

Extract from letter, Board of Education to S. N. Castle, June 30, 1865.

8 After 1865 Lahainaluna Seminary continued to be conducted on the same lines as prior thereto. But during the session of the Legislature of 1884 the argument was used in favor of an appropriation for St. Louis College that the Government was maintaining a sectarian school at Lahainaluna. In 1888 the argument was repeated in favor of the act to set off certain premises for the Roman Catholic Church, and its truth was admitted in both cases.

V.

In 1894 the Constitution of the Republic of Hawaii was promulgated. Article 98 thereof provides that * * * "No public money shall be appropriated * * * for the support of benefit of any sectarian, denominational or private school." This provision is continued and remains in full force as a part of Section 55 of the Organic Act.

Religious instruction upon the lines formerly pursued by the Mission, and subsequently by the Government in accordance with the agreement, was continued up to on or about September 1st, 1903, but ceased to be a part of the curriculum at Lahainaluna on or about said first day of September, 1903, and religious tenents and doctrines in accordance with the creed and articles of faith of the Mission then ceased to be taught and are no longer taught.

The "cultivation of sound literature and solid science" has also ceased, and the institution has become a technical school under the name of "The Lahainaluna Agricultural School."

See Report of Governor of Hawaii for 1904, p. 32;

See Exhibit I;

See extract from report of the Superintendent of Public Institutions to Governor of Hawaii, included in the above report for 1904 above referred to on page 35.

9 That the territory maintains no other institution of like character and on similar principles in any other places on these Islands.

VI.

That all the rights, property and interest of the American Board of Commissioners for Foreign Missions to any property in the Territory of Hawaii and any claim or demand whatsoever with reference thereto was by deed, duly executed and delivered, conveyed to Henry Waterhouse, since deceased, and your petitioners, Frederick J. Lowrey and William O. Smith by deed of trust, dated July 25, 1903, and recorded in the office of the Registrar of Conveyances in Honolulu, Island of Oahu, Territory of Hawaii, in Liber 254, pages 91 to 101.

That by the provisions of said trust deed in case of the decease of any of the trustees, the said American Board of Commissioners for Foreign Missions could appoint by certificate in writing duly acknowledged and authenticated and recorded in the office of the Registrar of Conveyances in Honolulu, a successor who upon said appointment should be vested with all the rights of said deceased Trustee and subject to the same obligations and duties. That said Henry Waterhouse has died since the execution and delivery of said trust deed and in accordance with said provision your petitioner, George P. Castle, was duly appointed as Trustee by said A. B. C. F. M., by certificate in writing duly recorded in said Registry.

That the right to recover, hold and manage any of the said properties or interests or rights, or any rights or interests arising therefrom or with reference thereto, so conveyed by the said trust deed, are now vested in your petitioners.

10 *Claim.*

Upon the foregoing facts, petitioners claim that the A. B. C. F. M., in April, 1849, was the owner of the land and improvements thereon occupied by the school or seminary at Lahainaluna; that at that time, in pursuance to an agreement between the said A. B. C. F. M. and the Hawaiian Government, as subsequently ratified by the said A. B. C. F. M. in August, 1849, and by the Hawaiian Legislature in July, 1850, the said A. B. C. F. M. transferred the said Lahainaluna School or Seminary and property to the said Government, in consideration of the agreement of the said Government to continue in the said school the teaching of the religious tenets and doctrines theretofore inculcated by the A. B. C. F. M. through the Mission, as summarized in a Confession of Faith submitted by the said Mission, not to teach or allow to be taught in the said school any religious tenet or doctrine contrary to those so inculcated by the said A. B. C. F. M. through the said Mission, and further to continue the said school at its expense as an institution for the cultivation of sound literature and solid science; and in case of the non-fulfillment or violation of any of the said conditions, the whole property so transferred, together with any additions or improvements which may have been made upon the premises, and all the rights and privileges so transferred, to revert to the said A. B. C. F. M. or the said Government to pay the sum of Fifteen Thousand (15,000) Dollars to the said A. B. C. F. M. at the option of the said Government; that

First: Said Government on or about the first day of September,

1903, ceased to continue the teaching of the said religious tenets and doctrines theretofore inculcated by the A. B. C. F. M. through the said Mission, contrary to its agreement; and therefore the
11 said Government must now either return the property, together with all improvements, or pay over the sum of Fifteen Thousand (15,000) Dollars, according to the tenor of its agreement;

Second: That on or about July 1, 1904, the said Government ceased to continue the said school as an institution for the cultivation of sound literature and solid science, contrary to its said agreement, and therefore the said Government must now either return the property together with all improvements or pay over the sum of Fifteen Thousand (15,000) Dollars, according to the tenor of its agreement.

That on or about the first day of September, 1904, your petitioners presented the foregoing claim to the Department of Public Instruction and to the Governor of the Territory of Hawaii and demanded that the Territory should reconvey the premises and property herein described or pay to them the sum of said Fifteen Thousand (15,000) Dollars, at the election of said Territory; and that the said Department of Public Instruction and the said Governor refused to either reconvey said premises and property or to pay the said sum of Fifteen Thousand (15,000) Dollars, and that the said Territory has elected to retain said premises and that election is evidenced by said refusal and by the further fact that it is proceeding to erect expensive and extensive buildings on said site and is proceeding to expend large sums of money in fitting said premises and said school to become a technical school, namely an agricultural school.

That your petitioners are the owners of said claim against the Territory of Hawaii; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, and that said claimants are justly entitled to the amount herein claimed, namely, the sum of Fifteen Thousand (15,000) Dollars, after allowing all just credits and offsets; that your petitioners and said
12 Henry Waterhouse and said American Board of Commissioners for Foreign Missions have and each of them has at all times borne allegiance to this Government and have not in any way voluntarily aided or abetted or given encouragement to rebellion against this Government and that they believe the facts as stated in this petition to be true.

Wherefore your petitioners pray that this Court shall hear and determine the facts in reference to said claim and may adjudge that your petitioners are entitled to judgment against the Territory of Hawaii in the sum of Fifteen Thousand (15,000) Dollars, and shall cause notice of the institution of this Petition to and these proceedings against the said Territory to be given to the said Territory and set a time for the hearing of the same.

(Sg.) F. J. LOWREY.
(Sg.) WILLIAM O. SMITH.
(Sg.) GEORGE P. CASTLE.

(Sg.) CASTLE & WITHINGTON,
(Sg.) SMITH & LEWIS,
Attorneys for Petitioners.

TERRITORY OF HAWAII, *Island of Oahu, Honolulu, ss:*

Frederick J. Lowrey, William O. Smith and George P. Castle, being duly sworn each for himself, deposes and says: that he is one of the petitioners above named, that he has read the fore-
13 going petition and that he believes the facts therein stated to be true.

(Sg.) F. J. LOWREY.
(Sg.) WILLIAM O. SMITH.
(Sg.) GEORGE P. CASTLE.

Subscribed and sworn to before me this 6th day of December, 1905.

T. M. HARRISON, [SEAL.]
Notary Public.

EXHIBIT AA.

Laws of the High School, as Amended and Adopted by the Mission June, 1835.

CHAPTER I.

Design of the School.

The design of the High School is,

1. To aid the Mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Saviour Jesus Christ, with all its accompanying blessings, civil, literary and religious.

4. Another object still more definite and of equal or greater importance, is, to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellow men.

CHAPTER VII.

Of the Studies of the School.

4. The whole school shall meet between daylight and sun-
14 rise each week day for prayer, at which one of the Instructors shall preside; the roll shall be called, absentees marked and called to an account at least once a week.

6. On the afternoons of Tuesdays and Thursdays each week, or at other times equivalent, the whole school shall meet for biblical instruction, embracing the interpretation of Scripture, evidence of Christianity, Archeology and Sacred Geography. And Friday afternoon of each week or time equivalent shall be spent in exhibiting and correcting compositions in the Hawaiian language and in elocution.

EXHIBIT A.

HONOLULU, *April* 25, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of the Hawaiian Islands.

SIR: The undersigned, a committee of the general meeting of the Mission of the A. B. C. F. M., at the Sandwich Islands, appointed in reference to the Mission Seminary at Lahainaluna, Maui, beg leave through your Excellency to offer a few remarks respecting that institution, and make some proposals in reference to it to His Majesty's Government for its consideration.

It is well known to His Majesty and also to most of the members of His Government that in the year 1831, the Mission commenced the establishment of the institution now known as the Mission Seminary of Lahainaluna, Maui, to promote the diffusion of enlightened literature and Christianity throughout the Islands.

From that period to the present time, this institution has been unceasingly and anxiously watched over, cherished and cared for by the Mission. No expense or pains coming within its appropriate means or power have been spared to promote its usefulness and secure the objects of its establishment.

Three missionaries have for a large portion of the time been devoted to its interests, and two at all times since the two or three first years of its existence. About $77,000.00 have been expended for its benefit, including the support of the teachers and the dwellings erected for their accommodation.

We need not point you to the fruits of this cherished institution, scattered throughout the Islands, filling various ports of honor, responsibility and usefulness, both in and out of the Government. They are well known to His Majesty, and the officers of His Government, and to none better than yourself.

This institution has been planted and sustained to the present time by the American Board of Commissioners of Foreign Missions, from donations given by the American churches for the spread of the gospel in heathen lands. That Board, as we learn by recent intelligence, was at the close of its last financial year embarrassed by a debt of $60,000.00 incurred in the prosecution of its labors of benevolence and mercy.

As a consequence of its indebtedness, it has been obliged to curtail its expenditures by diminishing its grants to each one of the Missions under its care, and this Mission in common with others has shared in the general reduction.

For this reason the Mission will be unable to carry forward its operations with the rigor to be desired in all of it departments of labor. Some must almost inevitably suffer for want of pecuniary means.

In view of these facts, and believing that under present circumstances the transfer of this institution to the fostering care and patronage of Government will promote the highest interests of the

Hawaiian people, we beg leave through your Excellency to
16 submit to His Majesty's Government for its consideration
the following proposals, viz:

That the Mission of the A. B. C. F. M. at the Sandwich Islands, acting for and in behalf of the said American Board of Commissioners of Foreign Missions, having its headquarters in Boston, State of Massachusetts, in the United States of America, relinquish all of their right, title and interest to and in the Seminary buildings located at Lahainaluna on the Island of Maui, and known as the Mission Seminary, together with all of the dwelling houses at that station erected by the Mission at the expense of the said A. B. C. F. M., for the use of the teachers in the said Mission Seminary; also the building erected by the Mission as a printing office and bindery, also all lands pertaining to and granted for the use of the Missionary Seminary, and also all philosophical and other apparatus procured for the use of the said Seminary, also the public library of the said institution, and to transfer the same to the Hawaiian Government for its use, benefit and behoof to have and to hold the same forever.

Providing, however, and this transfer is made upon the express condition that the said Hawaiian Government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid science; and further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, which we represent, a summary of which will be found in the confession of faith herewith enclosed, and in that in case of the nonfulfillment or violation of the conditions upon which this transfer is made by the said Government, the whole property hereby transferred, hereinbefore specified, together with any additions or
17 improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian Government, by the said Island Mission, shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board Commissioners of Foreign Missions.

These proposals, if accepted, by the Hawaiian Government shall not have binding force until they shall have received the sanction of the Prudential Committee of the American Board Commissioners of Foreign Missions in Boston; and further should the said Hawaiian Government accept the proposals here presented, and enter forthwith upon the fulfillment of the conditions, and should the said transfer not meet the approbation of the Prudential Committee, the Mission on its part, pledges itself to refund to the said Government any necessary expenses it may have incurred in carrying on the institution whilst the parties were awaiting the ratification or rejection of this transfer by the said Prudential Committee. Provided, however, that moneys shall not have been expended in enlargement or improvements, other than what may have been actually necessary to keep the buildings in repair and carry on the institution.

In case of disagreement of the parties as to the amount proper to

be refunded, in case of the non-ratification of this conveyance by the Prudential Committee, the sum shall be determined by two arbitrators one of which shall be chosen by each of the respective parties, and which arbitrators in case of disagreement shall elect a third to decide upon the award.

The foregoing remarks and proposals are respectfully submitted for the consideration of His Majesty's Government, and I — feel greatly obliged by an early answer.

18 We have the honor to be,

Very respectfully, Your Ex. friends and Most Obedient servants,

W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE, *Com.*,
By S. N. CASTLE.

Confession of Faith.

EXHIBT. A-1.

I believe in Jehovah;—that he exists without beginning, without end, and without change; that though he is not seen with mortal eyes, yet he is every where present and sees all things; that in power and wisdom, and goodness, in all perfections and excellencies he is infinite; that he made the earth and the heavens men and angels, all worlds, and all that is in them; that he upholds, and governs all according to his own pleasure, that he alone is God and that all beside him that are called gods are vanity and the work of errors.

2. I believe in the scriptures of the Old and New Testaments, that they are the word of God, and the sure, and perfect and only rule of holy faith and practice.

3. I believe that man was originally created in the image of God, pure and happy; that he fell by transgression, and that consequently, all mankind of every generation are naturally in a state of corruption, guilt and death.

4. I believe that God in his sovereign mercy, gave early promise of a Savior, and according to his promise, has sent his Son into the world, made of a woman and in the likeness of man.

5. I believe in the Lord Jesus Christ; that he is the Son of God; that he died upon the cross as a propitiation for our sins, and

19 for the sins of the whole world, that there is full redemption in his blood, even the forgiveness of sins, and justifications unto life eternal unto all that believe in his Name; that there is none other name given under heaven among men, whereby we must or can be saved; that he is the King of Zion, has all power in heaven and earth, and will judge the quick and the dead.

6. I believe in the Holy Spirit, the Spirit of God; that it is by him that men are convinced of sin, renewed after the image of God, unto righteousness and true holiness, and fitted to dwell forever in heaven.

7. I believe that in all ages, Jehovah has had a church in the world, in which he has graciously dwelt, and which he designs to

establish in all nations, and to make an eternal excellency; and that it is his will that all who are made partakers of the grace of the gospel should publicly and solemnly join themselves to his church and walk before him in all his statutes and ordinances with a perfect heart.

8. I believe in the resurrection of the body in the judgment of the great day, and in the everlasting happiness of the righteous and the everlasting punishment of the wicked.

Exhibit B.

Passed in Privy Council April 26, 1849.

A communication having been received from the Rev. W. P. Alexander, Rev. C. B. Andrews and S. N. Castle, as a committee of the American Mission of these Islands proposing to transfer the entire property of the Seminary at Lahainaluna, Island of Maui, to the Government of the Hawaiian Islands, to be its property forever, on certain specified conditions, Therefore,

Resolved, I. That the above proposals be accepted, subject to the ratification of the Legislature; provided, that in case of the
20 non-fulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishmen to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the *the* Island, or pay the sum of $15,000. to said Mission, in behalf of the Mission Board of Boston.

Resolved, II. That the sum of $3000. be appropriated from the Royal Treasury for the support of said Institution for one year, commencing on the first day of June next.

Resolved, III. That the Minister of Public Instruction be instructed to secure the services of two competent teachers for said Seminary on such terms as to him may seem equitable and proper.

Resolved, IV. That the Institutions be committed to the Minister of Public Instruction, as in the case of the Royal School; and that it be his duty to make an annual report of the same to the Legislature.

Resolved, V. That all lands belonging to the Government in Kaanapali be appropriated to the use of the said Seminary at Lahainaluna, to be disposed of by the Minister of Public Instruc-
21 tion in consultation with the King's Cabinet with a view to providing as far as possible, an annual income for the support of the Seminary above named.

OFFICE OF PUBLIC INSTRUCTION, *April 27th*, 1849.

EXHIBIT C.

To Rev. Wm. P. Alexander, Rev. C. B. Andrews, S. N. Castle.

GENTLEMEN: I have the honor to acknowledge the receipt of your letter of the 25th inst. proposing on certain conditions, to transfer the Seminary at Lahainaluna to the Government of these Islands; and to inform you that your generous proposal was this day submitted to His Majesty in Privy Council, and the resolutions enclosed were unanimously adopted with reference thereto.

You will please to inform me at your earliest convenience, whether the several conditions specified in these resolutions are acceded to by the Mission; and accept in the meantime the acknowledgements of His Majesty's Government for so valuable an offer.

I am gentlemen, with the highest esteem, your obedient humble servant,

(Sgd.) RICHARD ARMSTRONG,
Minister of Public Instruction.

EXHIBIT D.

HONOLULU, *April 28th*, 1849.

To Ex. R. Armstrong, Minister of Public Instruction, of His Hawaiian Majesty.

22 SIR: Your letter of the 27th inst. with certain Resolutions of His Majesty's Privy Council accompanying, in answer to and based upon certain proposals, made by the undersigned as committee, on behalf of the American Mission, through your Excellency, to His Majesty's Government, respecting the Mission Seminary, on the 25th inst., came to hand last evening.

The said letter and resolutions have been laid before the General Meeting of the Mission, for its action and we are directed to furnish your Excellency, for the use of His Majesty's Government a copy of the preamble and resolutions adopted on the occasion, which we have the honor to transmit herewith.

We remain very truly,
Yours most obedient servants,

(Sgd.) W. P. ALEXANDER,
" C. B. ANDREWS,
" S. N. CASTLE,
Committee.

EXHIBIT E.

Preamble and Resolutions Adopted in General Meeting, April 28th, 1849.

Whereas, a letter has been received by this Mission through Messrs. Alexander, Andrews and Castle, a committee appointed in reference to the Mission Seminary at Lahainaluna, from Mr. Arm-

strong, His Majesty's Minister of Public Instruction, accompanied by a copy of Resolutions passed by his Majesty's Privy Council of the 27th of April last; accepting of certain conditional proposals, in reference to the said Seminary, made by said Committee on behalf of the Mission on the 25th inst., and

Whereas, His Majesty's Government has been pleased to
23 add certain other proposals or conditions to those of said committee, made on behalf of the said Sandwich Islands Mission therefore:

Resolved—1st. That this Mission, assembled in General Meeting, approve of and accept the said additional conditions proposed by His Majesty's Government and that, if further testimonials of conveyance than is found in the correspondence between the said Committee and the said Hawaiian Government, be deemed necessary by the said Government, the Minister of Public Instruction, or such other officer as shall be deemed proper by His Majesty's Government, be requested to make or cause to be made out duplicate copies of the said Instrument of Conveyance, embracing all particulars, which shall be thought necessary, one of the said copies to be delivered to this Mission, to be deposited in its Archives.

Resolved—2nd. That the said Committee be instructed to furnish the Mission of Public Instruction with a copy of this preamble and these resolutions for the use of His Majesty's Government.

EXHIBIT F.

HONOLULU, *May 8th*, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of His Hawaiian Majesty.

SIR: Being instructed by the American Mission, in their General Me-ting lately adjourned, we would, as their Committee, most respectfully present for your consideration the confession of faith within enclosed, as a substitute for the one given with the articles of agreement transferring the Mission Sem'y, at Lahainaluna, to the Hawaiian Government.

The reasons for requesting the substitution are, that the
24 previously presented confession, although according in all its specified doctrines with our belief and with that also of the Churches by whom that institution has been founded and sustained, is yet not so disinctive, as to present a barrier to the introduction there, of other deleterious doctrine not specified in said confession. It will admit also, of teachings of this Mission and of the Churches sustaining it, such as we feel to be entirely subversive of Evangelical Christianity. Not doubting, but that these reasons will commend themselves to the members of His Majesty's Government, we beg leave to express in presenting them the high consideration with which we remain,

Your Ex. Most Sincere Friends and obedient servants,

(Sgd.) W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE,
Committee.

Confession of Faith.

EXHIBIT F-1.

We Believe,

1. That there is one only living and true God, the Creator, preserver, and Governor of the Universe; a Being Self-existent, independent, and immutable, infinite in power, wisdom, justice, goodness, mercy and truth;

2. That the Scriptures of the Old and New Testaments were given by inspiration of God; that they contain a complete and harmonious system of Divine truth, and are the only perfect rule of Christian faith and practice;

3. That God is revealed in the Scriptures as the Father, the Son and the Holy Ghost, and that these three are one, and in all Divine attribution, equal;

4. That God made all things for himself; that he governs all things according to the council of his own will, and that the principles and administration of his government are holy, just and good;

5. That our first parents were originally holy; that they fell from that state by transgressing the command of God; and that in consequence of their apostacy, all their descendants are without holiness, and alienated from God, until their hearts are renewed by Divine Grace;

6. That Christ, being God manifest in the flesh, has, by his obedience, sufferings, and death made an atonement for sin, on account of which pardon and salvation are offered to all who truly repent and believe in him; and that all who will, may come and take of the water of life freely; but, that such is the aversion of man to these terms of salvation, that all refuse to comply with them, without the special influences of the Holy Spirit;

7. That those who embrace the Gospel, were chosen in Christ before the foundation of the world, that they should be Holy and without blame before him in love; and that they should be saved not by works of righteousness which they have done, but according to the distinguishing mercy of God, through Sanctification of the Spirit, and belief of the truth;

8. That those who cordially embrace Christ will be kept by the mighty power of God through faith unto Salvation;

9. That there will be a general resurrection both of the just and the unjust; and a day of judgment, when all must give account to Christ of all deeds done in the body; when the impenitent will go away into punishment, and the righteous into life, both of which will be without end;

10. That the Lord Jesus Christ has a visible church in the world; that the terms of membership are a credible profession of faith in Christ, and of that holiness which is brought by the renewing grace of God; that none but members of the visible church in regular standing, have a right to partake of the Lord's Supper, and that only they and their households can be admitted to the ordinance of Baptism.

Exhibit G.

Office of Public Instruction.

To Rev. Rev. Wm. P. Alexander Rev. C. B. Andrews, S. N. Castle, Esq.,

Gentlemen: Your letter of May 8th, enclosing a confession of faith which you request may be substituted for the one accompanying your letter of the 25th of April, has been received, and I have only to state that the request is granted, and the substitution made.

It will be desirable, I think, when a deed of transfer is made, to incorporate this confession of faith in it. But this cannot be done until the transaction is ratified by the American Board and the Legislature of the Islands.

Very respectfully, Your humble servant,

R. ARMSTRON-,
Minister of Public Instruction.

Exhibit H.

Honolulu, March 1850.

Dear Sir: On behalf of the Committee acting for the Missions in the interim of the General Meeting, I beg leave for the in-
27 formation of His Majesty's Government to communicate to you the following Resolution passed by the Prudential Committee of the American Board of Commissioners for Foreign Mission on the 21st of August, 1849, viz:

Resolved, that the agreement "entered into by the Sandwich Islands Mission in April last, transferring the Seminary at Lahainaluna, in the Sandwich Islands to the Government of said Islands, on conditions stated in a letter from the Mission to the Minister of Public Instruction, dated, Honolulu, April 25, 1849, and in a letter from the Minister of Public Instruction, dated, April 27th, 1849, be approved by the Prudential Committee and that the Secretary, having charge of the foreign correspondence, give immediate information of this fact to the Mission."

Very respectfully, Your friend and servant,

(S'g'd) SAM'L N. CASTLE.

To His Ex. R. Armstrong, Minister of Public Instruction, of the Hawaiian Government.

EXHIBIT "I I."

Extract from Letter from Rufus Anderson, Secretary of A. B. C. F. M. to Reverend William P. Alexander, Sandwich Islands, Dated Missionary House, Boston, July 27, 1850.

You ask that your release may take effect from June 1, 1849, assigning as a reason, that you have drawn nothing from the funds of the Board since that date, the Hawaiian Government having paid your salary during the year as teacher of the Seminary at Lahainaluna; and that, by fixing this date for your release, the Mission will be saved from the trouble of settling any questions relative to the *avails* of a few surveying excursions you made during the
28 year. It seems to the Committee, as at present advised, that the fact of your salary's being paid by the Hawaiian Government does not itself at all affect your relation to the Board and to the Mission. While connected with the Board, you of course sustain a full connection with the Mission as such, and instruct in the Seminary as a Missionary of the Board and a member of the Mission. It can make no difference whether your salary be paid by the Hawaiian Government or not, (although we of course expected them, when they took the Seminary to defray all its expenses) or whether it is paid directly to you or into the treasury of the Mission.

EXHIBIT I.

Extract from Report of Superintendent of Public Instruction to Governor of Hawaii, Including in the Report for 1904, *page* 35.

At the beginning of this school year the department of public instruction undertook a complete reorganization of Lahainaluna. Arrangements were made for erecting proper and convenient buildings and an entirely new set of instructors was obtained. The aim of the institution at the present time is to be an agricultural school. A carpenter shop, a blacksmith shop and a modern printing outfit have been supplied. Draft animals have been purchased and a considerable quantity of land has been put into cultivation. But for the delay in erecting the new buildings the institution could have very many more pupils than it supports at present. There is every hope, however, that during the coming year a complete success may be made of the place. A thoroughly revised curriculum will be adopted at the commencement of the year.

Endorsed and filed Dec. 6, 1905. (Sg.) J. A. Thompson, Clerk.

29 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1905, December Session, A. D. 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees, Petitioners,

vs.

THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Demurrer of Respondent, Territory of Hawaii.

Now comes the Territory of Hawaii, by M. F. Prosser, Esq., Deputy Attorney General of the Territory of Hawaii, and demurs to the amended petition of petitioners heretofore filed herein on the following grounds and for the following reasons:

1.

That this Court has no jurisdiction of the subject matter of the claim as set forth in said petition.

2.

That there is a non-joinder of parties respondent in that the United States of America is a necessary and proper party respondent, the property in said petition described having been, by the Republic of Hawaii, transferred and ceded to the United States of America by the treaty of annexation adopted and approved July 7th, 1898.

3.

That said petition does not state facts sufficient to constitute a cause of action as against this respondent in that:

30 (*a*) It appears by said petition that the purported agreement therein set forth was subject to, and of no effect without, ratification by the legislature of the Kingdom of Hawaii and it nowhere appears in said petition that such agreement as set forth therein was ever ratified by such legislature.

(*b*) That it appears by said petition that petitioners' right of action, if any, accrued more than two years prior to the commencement of this action.

(*c*) That it does not appear by said petition that there has been a breach of any condition upon which the transfer therein set forth to the Kingdom of Hawaii was made.

(*d*) That it affirmatively appears by said petition that the conditions of said purported agreement if broken at all have been broken in compliance with laws and statutes which render the fulfilment of such conditions impossible.

4.

That said petition is indefinite and uncertain in that the allegations therein contained as to breach of conditions as therein pleaded are

conclusions of law, it nowhere appearing in said petition in what respect the conditions therein pleaded have been broken.

Dated Honolulu, December 15th, A. D. 1905.

TERRITORY OF HAWAII,
By M. F. PROSSER,
Deputy Attorney General.

Endorsed and filed Dec. 15, 1905. (Sg.) George Lucas, Clerk.

31 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees,
v.
THE TERRITORY OF HAWAII.

Original.

Argued December 18, 1905; Decided January 3, 1906.

Frear, C. J.; Hartwell and Wilder, JJ.

Territory—action against for its breach of agreement made in 1849, between the Hawaiian Government and American Board.—This court has jurisdiction of an action of assumpsit by the successors of the American Board of Foreign Missions brought upon a breach by the Territory of an agreement made between the board and the Hawaiian government in 1849.

Id.—agreement—construction of—new term not added by acts of parties.—A transfer was made by the American Board to the Hawaiian government of the Lahainaluna school property on condition that "the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission," etc., and that in case of nonfulfilment of the condition the sum of $15,000 should be paid. From the date of the transaction until 1903, religious instruction continued to be taught at the school as previously, both parties appearing to regard such instruction
32 as required by their agreement. Held: the express agreement does not require that the specified instruction should be given, and the terms of the agreement being clear and unambiguous the practical construction which the parties have made does not introduce a new term in the agreement.

The school was changed by the Territory to a technical school under the name of the "Lahainaluna Agricultural School." Held: this is not a breach of the agreement to continue the institution for the cultivation of sound literature and solid science.

33 *Opinion of the Court by Hartwell, J.*

The plaintiffs claim of the defendant the sum of $15,000 for its breach of agreement under the following circumstances:

In 1849, the Hawaiian government, at the suggestion of the American Board of Commissioners for Foreign Missions, took the Lahainaluna school property on the Island of Maui, which consisted of a claim of the board, then withdrawn, for a Land Commission Award for the land used by the school and the school buildings, library and philosophical and other apparatus which were burned in 1862 and replaced by the government. A letter of April 25, 1849, from W. P. Alexander, C. B. Andrews and S. N. Castle, a committee of the Hawaiian Mission representing the board, to Richard Armstrong, Minister of Public Instruction, expressed the condition on which the transfer was made to be as follows: "That the said institution *shall be continued* at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith enclosed." A further proviso was expressed in the letter that "in case of nonfulfilment or violation of the conditions" the property should revert to the mission, or, as modified by the government, it might at its option pay the sum of $15,000, and if it should divert the establishment to other purposes than those of education it would "sustain an institution of like character and on similar principles in some other place on the islands, or pay the sum of $15,000."

The plaintiffs contend that the expressed agreement meant not only that the government should not teach nor allow the teaching of any religious doctrine contrary to the specified confession of faith, but that it should require those doctrines to be taught.

34 This contention is based upon the facts averred in the petition that the American Board in 1835 obtained the Lahainaluna premises from the Hawaiian chiefs for a school, the purpose of which was to introduce and perpetuate the Christian religion and to educate young men to become assistant teachers of religion, meaning that they should be educated in accordance with the tenets of the Calvinistic creed which then prevailed at the Andover Theological Seminary; that the school was established in 1831 and until 1849 carried on by the board in strict accordance with its purposes as above expressed, all of which was perfectly understood and appreciated by Richard Armstrong, to whom the letter of the committee was addressed, and by the other members of the Hawaiian government; that from the time of taking the school in 1849 until 1903 the Hawaiian government caused religious instruction to be given at the school as it formerly had been given, thereby showing its understanding that the agreement required this to be done. This understanding on the part of the government was further shown by a letter of October 29, 1864, of Attorney General C. C. Harris to

the board of education advising that only those sects could control the school which taught the doctrines of each and all the articles of the confession of faith and if the government was not willing to keep the conditions the property and improvements must be restored to the American Board; that the following year the board of education declared that "a full compliance with the agreement consists in appointment of persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States, and if the board do not see fit to carry on the institution they must reconvey it or pay the sum of $15,000."

It is alleged that religious instruction at the school ceased in September, 1903, when the Territory made the school a technical school named the Lahainaluna Agricultural School. The cessation of religious instruction and of instruction in sound literature and
35 solid science other than is implied in the teaching required at a technical and agricultural school is alleged to be a breach of the original agreement.

The plaintiffs contend that a practical construction has been placed upon the agreement by both parties, which is binding upon the defendant, conforming, as it does, to the objects for which the school was primarily established.

It is too late, they say, after both sides for over fifty years have acted upon the agreement as one which required that the government continue the previous course of religious instruction at the school, for the Territory now to restrict the meaning of the agreement to its precise meaning.

That the unwritten term above mentioned was by the parties themselves read into and made part of the agreement has been urged in the plaintiffs' argument and in their brief with great earnestness and evidently with profound conviction of its truth. In support of their contention they cite numerous decisions and extracts from text writers, including Lord Chancellor Sugden's remark, "Tell me what you have done under a deed and I will tell you what that deed means," which remark, it is said, "has come to be accepted as a maxim in the construction of contracts." Chicago Ry. Co., *v.* N. P. Ry. Co., 101 Fed. 792. This was a case in which the court held that a contract between two railways, requiring one of them to keep and maintain in good order property in their joint use, included the expense incurred for flagmen, station agents, switch tenders and other employees whose services were necessary to the safe and orderly operation of trains running over the joint tracks, and especially as the expense had for ten years been paid by the company on monthly itemized statements, showing how both companies understood the contract and there being "no inconsistency between the terms of the contract and the practice of the parties under it." We have no access to the report of the case in
36 which the Sugden remark is said to have been made, Drummond *v.* Atty. Gen., 3 Dr. & W. 165. It appears from the report of the case on appeal, 2 Ho. Lords Cas., 186, that the court was required to say whether the expression "protestant dissenters," used in a deed of trust, included Unitarians who had for a long time been

treated by the trustees as within the meaning of the trust deed. Much evidence was received consisting in great part of historical documents, extracts from sermons and theological and controversial works published by the trustees, ministers of Dublin congregations, both prior to and after the foundation of the charity. There was further evidence "that the founders and original trustees and their successors for a long time were not merely trinitarian protestant dissenters, but that they had in various ways manifested the utmost abhorrence of unitarians and their doctrine." Lord Chancellor Sugden decreed that unitarians were not entitled to participate in the trust funds and that those of them who were trustees should be removed and others, trinitarians, appointed in their places. The decree was affirmed on appeal, the court saying, "It is clear that the words of themselves have not any such known legal meaning as the appellants would attach to them." Neither of these cases would authorize the admission of evidence to explain the meaning of words having an established, clear and unambiguous meaning. It is only with reference to ambiguaus, uncertain or incomplete terms in a contract that the citations in the plaintiffs' brief apply, namely, that "a construction of a contract, adopted and acted upon by both parties will be regarded as worked into the contract." 1 Wharton, Contracts, Sec. 206.

"In cases where the language used by the parties to the contract is indefinite and ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence." Topliff *v.* Topliff, 122 U. S.
37 121.

"Where the language used by the parties to a contract is of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influence." Chicago *v.* Sheldon, 9 Wall. 50.

"The great object and only foundation of all rules of construction is to come at the intention of the parties, and if the words or terms are equivocal, resort may always be had to the circumstances under which the contract was executed, contemporaneous constructions of the parties, as evidenced by their acts, and any subsequent acts showing how the parties understood their contract and what practical construction they put upon it." White *v.* Amsden, 67 Vt. 1.

"If the parties have used words which have an ordinary meaning free from ambiguity, and no technical meaning is shown, extrinsic evidence is inadmissible to show that the parties used such terms in a sense different from their ordinary meaning, as the only effect of such evidence would be to contradict the legal effect of the language which the parties themselves have used." 2 Page, Contracts, Sec. 1111.

"If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight." *Ib.* Sec. 1126.

"Under cover of construction a court cannot reform a written contract to make it express the real intention of the parties, which by mistake is not expressed in the words thereof." *Ib.* Sec. 1130.

Thus it appears from many of the plaintiffs' citations that the rule of construction of contracts is not as broad as they claim.

The terms of agreement are not of doubtful import,—they are as clear as language can express. Why it was that no condition was made which required the government to give religious instruction, why the representatives of the board thought that this condition would be observed although not expressed, and why it appears to have been regarded by the government as an implied condition, becomes evident, we think, upon reflection. No man of New England birth and training was unfamiliar with the general custom prevailing in the public schools of giving at least the amount of religious instruction included in morning prayers and in scriptural readings; no one familiar with this custom as were most, if not all, of the missionaries in Hawaii, would for a moment have doubted that some sort
38 of religious instruction would continue indefinitely to be taught at the Lahainaluna school as well as all other schools. In the thought of the American Board and of the Hawaiian Mission as well it was requisite merely to restrict such instruction to the inculcation of those doctrines in which they believed. Those officers of the Hawaiian government, who, like attorney general Harris, were members of the protestant Episcopal Church, were perfectly aware of the distinctive theological tenets of their own church and of other evangelical churches of America and knew that the teaching at Lahainaluna of their own church doctrines would be to repudiate the agreement with the American Board and would result in a forfeiture of the property transferred to the government by the board unless the sum of $15,000 should be paid in accordance with the agreement; they did not, on their part, contemplate that which has come to pass, namely, that the school might receive no religious instruction upon any theological basis. One may regret that wise and devout Christian men in America, whose practical Christianity was sufficient to enable them in their several ways to accomplish so much for the uplifting of humanity, have found themselves unable to agree upon some form of religious instruction in the schools, but thus far this has not come about.

Whatever the reasons which influenced the Hawaiian government in treating the agreement as it did, its officers had no power to add to or subtract from its clearly expressed terms, nor did they by carefully avoiding the teaching of any doctrines, other than those mentioned in the agreement, thereby admit any obligation of the government to teach any doctrines.

As for the American Board, whether by oversight, or because they thought it unnecessary, or that it was unwise in view of the possibility of exciting antagonism in the legislature or in the cabinet of the King, they did not incorporate in the agreement the require-
39 ment which the plaintiffs say was intended to be agreed upon. This court has no right to take the agreement as meaning anything else than it clearly expresses.

We have preferred, before stating and discussing the defendant's demurrer to the petition, to consider what the agreement was to which the demurrer applied. It follows from holding that there was no agreement for affirmative religious teaching but merely that no

heterodox instruction should be allowed, that no breach of agreement resulted from ceasing to teach the prescribed doctrines. This amounts to sustaining the ground in the defendant's demurrer which claims that the petition sets forth upon the subject no cause of action. The grounds of the demurrer in substance are (1) that this court has no jurisdiction of the claim for damages; (2) that the United States, to whom the land has been ceded upon which the school is established, ought to be made codefendant; (3) that no cause of action is stated, it appearing (*a*) that the agreement was subject to ratification by the legislature and the act of July 11, 1850, relating to the Lahainaluna seminary failing to set forth the terms on which the arrangement was made but merely that one had been made "whereby the seminary of Lahainaluna has been ceded to the King's government on condition that the government undertakes its support," (*b*) that the right of action, if any, accrued upon the annexation in 1898, more than two years prior to the commencement of this action, (*c*) that no breach of any condition is shown, and (*d*) that if the conditions of the agreement were broken this was done in consequence of laws rendering the performance of them impossible; (4) that the petition pleads conclusions of law in its assignment of breach of conditions, not setting forth in what respect the conditions were broken.

The first, second and fourth grounds and divisions *a*, and *b*, of the third ground of the demurrer are not sustained.

40 The question of the impossibility of the performance of the agreement presented by the demurrer relates to the provisions in section 55 of the Organic Act, "nor shall any public money be appropriated for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the government," being in effect the same as the requirement of article 97 of the constitution of 1894, prohibiting public aid to sectarian or private schools. As we have held that there was no agreement to teach certain religious doctrines, the question does not arise of the effect of subsequent legislation and, in view of its importance, ought not to be passed upon *obiter*.

This leaves the question whether the agreement to teach sound literature and solid science was broken by failure to teach those branches of learning otherwise than they would require to be taught in a technical school and school of agriculture. The averment in the petition of the fact that the "cultivation of sound literature and solid science has also ceased" would raise an issue of fact to be tried on evidence were it not modified, and necessarily controlled, by the additional averment that "the institution has become a technical school under the name of the Lahainaluna Agricultural School." By the rule that at common law pleadings are construed, as far as they reasonably may be, against the pleader, the additional averment must be taken to be an admission that the usual technical training is now given at the school in the science of agriculture, so that it becomes a question of law whether such training eliminates, as contended by the plaintiffs, or, on the other hand, includes instruction in sound literature and solid science. An agreement to teach solid science is not violated, but is observed, by teaching applied

science relating to agriculture. The science of agriculture cannot be taught without imparting at the same time instruction in the littrature relating to the science. We are not prepared to say that such literature, so taught, is not as sound or as valuable as are
41 literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science.

The plaintiffs say that an agricultural school, although scientific in character, "is a school primarily intended to the training of its students in the adaptation of certain selected branches of knowledge to a handicraft or industry; while incidentally the school probably does lead in the in*cluca*tion of some learning and knowledge, it would be knowledge or learning of a special character, the accomplishment of which in itself is not the purpose of the school. The purpose of the school is rather intended for the training of men for an occupation. This negatives the idea that it is an institution for the cultivation of solid science."

Cases are cited which discuss the meaning of literary and scientific institutions, technical schools and schools generally, with reference to exemption of property from taxation, but this case does not demand strict construction of a statute which exempts property from taxation. In consider*a*ing the meaning of the agreement we derive no assistance from definitions of "literature" and "science" or from considering the various purposes of acquiring knowledge for general use or for use in specific work.

The literature taught in American schools fifty years ago did not include the literary courses of the present day; little more was taught which hinted at literature than reading, grammar and composition, the object being to acquire a habit of using the English, and at Lahainaluna the Hawaiian, language correctly. A technical school may or may not, according to its grade, require these studies, but a correct and intelligent use of language is as likely to be acquired in connection with technical studies as when made a separate subject of study. Probably Lahainaluna pupils obtained more proficiency in the use of language by their practical work in printing, which
42 for many years was extensively carried on there, than by theoretical studies.

In no way of looking at the subject which commends itself to our judgment do we regard the agreement as violated by making this a technical school of literature.

The demurrer is sustained.

(Signed) W. F. FREAR.
(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.

D. L. Withington and C. H. Olson, Castle & Withington and Smith & Lewis on the brief, for plaintiffs.

M. F. Prosser, Deputy Attorney General, for the Territory.

(Endorsed:) Supreme Court Territory of Hawaii. F. J. Lowrey *et al.* Trustees *vs.* Territory of Hawaii. Decision. Filed Jan. 3, 1906. George Lucas, Clerk.

43 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,
vs.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Judgment.

This cause being heard this day upon the demurrer of the defendant to the plaintiff's amended petition and argued by counsel and the court being fully advised in the premises, is of the opinion and do therefore order that said demurrer be, and the same is hereby sustained.

And thereupon the plaintiff not asking to plead further, it is considered by the Court that the defendant go hence without day.

Dated, Honolulu, H. T. 3rd January 1906.

By the Court.

(Sg.) GEORGE LUCAS, *Clerk.*

Endorsed and filed Jan. 12, 1906 as of January 3, 1906. (Sg.) George Lucas, Clerk.

44 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,
vs.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Bond on Appeal.

Know all men by these presents: That we, Frederick J. Lowrey, George P. Castle and William O. Smith, and W. A. Bowen and Charles M. Cooke, all of the City of Honolulu in the County of Oahu and Territory of Hawaii, are held and firmly bound unto the above named Territory of Hawaii in the sum of five hundred dollars, to be paid to the said Territory of Hawaii, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 17th day of January 1906.

Whereas, the above named Frederick J. Lowrey, George P. Castle and William O. Smith, as Trustees, have prosecuted an appeal to the

Supreme Court of the United States, to reverse the order rendered in the above entitled suit, by the Supreme Court of the Territory of Hawaii.

Now, therefore, the condition of this obligation is such, that if the above named Frederick J. Lowrey, George P. Castle and William O. Smith shall prosecute said appeal to effect and answer all damages and costs, if they shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Sg.)	F. J. LOWREY.	[SEAL.]
(Sg.)	GEORGE P. CASTLE.	[SEAL.]
(Sg.)	WM. A. BOWEN.	[SEAL.]
(Sg.)	CHARLES M. COOKE.	[SEAL.]
(Sg.)	WILLIAM O. SMITH,	[SEAL.]

By His Attorney in Fact, W. J. FORBES.

Approved by
(Sg.) M. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed and filed January 18, 1906 at 10.10 A. M. (Sg.) Henry Smith Clerk Supreme Court.

45 In the Supreme Court of the United States.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
TERRITORY OF HAWAII, Appellee.

On Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now come Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, the Appellants in the above entitled action, and say that in the record of the proceedings in the said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That it was error to sustain the demurrer to the petition of the Appellants.

2. That it was error to sustain said demurrer and to render judgment against these Appellants and in favor of the Appellee.

3. That it was error to hold that in the contract between the mission and the Hawaiian Government there was no agreement for affirmative religious teaching but merely that no heterodox instruction should be allowed, and in holding that no breach of agreement resulted from ceasing to teach the prescribed doctrines.

46 4. That there was error in failing to hold that the agreement that the said Institution shall be conducted at the ex-

pense of the Hawaiian Government as an institution for the cultivation of sound literature and solid science of itself was an agreement to continue that Institution upon the same principles and the same general character as it had previously been conducted, namely as an institution for the inculcation, amongst other purposes, of religion, and of the doctrines contained in the Confession of Faith annexed to the Agreement.

5. That it was error to hold that the terms of the agreement are not of doubtful import, since in case these terms do not import an absolute agreement to continue religious instruction of the character for the giving of which the school was founded, the terms at least are of such doubtful import as to require the evidence of the surrounding circumstances and the subsequent construction to control.

6. That it was error to hold that the practical construction placed upon this contract by the Government over a space of fifty years, and the uniform admission of the obligation to teach the doctrines specified, and the avoiding of the teaching of any other doctrines are not an admission of any obligation of the Government to teach such doctrines.

7. That it was error to hold that the conversion of the Institution into a Technical School under the name of the "Lahainaluna Agricultural School," in connection with the averment that the cultivation of sound literature and solid science has ceased, does not allege a breach of the agreement.

8. That there was error in holding that the agreement to teach solid science and sound literature is not violated by teaching
47 solely that literature which is limited by the study of science, or the science of agriculture.

9. That there was error in holding that an agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture exclusively.

10. That there was error in holding that a school primarily intended for the training of its students in the adaption of certain selected branches of knowledge to a handicraft or industry is a school of learning as well as a school of art within the meaning of the agreement.

Wherefore the said Appellants, Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, pray that the order of the said Supreme Court of the Territory of Hawaii, made in the above entitled action on the 3rd day of January, 1906, sustaining said demurrer and rendering judgment for the Territory of Hawaii be reversed, and that the Supreme Court of the Territory of Hawaii be ordered to overrule the respondent's demurrer to the petition in said action.

SMITH & LEWIS,
DAVID L. WITHINGTON,
CASTLE & WITHINGTON,
Attorneys for Petitioners, Appellants.

48 [Endorsed:] In the Supreme Court of the United States. Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, Appellants, *vs.* Territory of Hawaii, Appellee. Assignment of Errors. Filed January 18 1906 at 10:10 a. m. Henry Smith Clerk Supreme Court Ter. Hawaii Castle & Withington & Smith & Lewis, Attorneys for Petitioners, Appellants.

49 In the Supreme Court of the United States.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
THE TERRITORY OF HAWAII, Appellee.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To the Territory of Hawaii, Greeting:—

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal, filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, are appellants, and you, the Territory of Hawaii are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Walter F. Frear, Chief-Justice of the Supreme Court of the Territory of Hawaii, this 18th day of January, in the year of Our Lord one thousand nine hundred and six.

W. F. FREAR,
Chief-Justice of the Supreme Court of The Territory of Hawaii.

50 In the Supreme Court of the Territory of Hawaii, October Term 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,
vs.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Appeal.

The above named petitioners, Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, conceiving themselves aggrieved by the order entered on the 3rd day of January 1906, in the

above entitled proceeding, do hereby appeal from said order to the Supreme Court of the United States, and pray that this appeal may be allowed, for the reasons specified in the assignment of errors; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Honolulu, H. T. 18th January 1906.

SMITH & LEWIS,
D. L. WITHINGTON,
CASTLE & WITHINGTON,
Attorneys for the Petitioners.

And now, to wit: On the 18th January 1906, it is ordered that the appeal be allowed as prayed for.

W. F. FREAR,
Chief-Justice of the Supreme Court of the Territory of Hawaii.

51 Service of the within and foregoing appeal and citation and the receipt of a copy thereof admitted this 18th day of January, 1906.

M. F. PROSSER,
Deputy Att'y General,
Attorney for the Territory of Hawaii.

[Endorsed:] Supreme Court of the United States. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees *vs* The Territory of Hawaii. Appeal and Citation. Filed January 18 1906 at 10:10 a. m. Henry Smith Clerk Supreme Court Ter. Hawaii Castle & Withington Attorneys for petitioners.

52 In the Supreme Court of the Territory of Hawaii, October Term 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
THE TERRITORY OF HAWAII, Appellee.

UNITED STATES OF AMERICA, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Appeal, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 51 inclusive, contain a true and complete transcript of the record and proceedings, including the Assignment of Errors and the original Appeal and Citation on Appeal, in said Court in the cause of Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, Appellants, against, The Territory of Hawaii, Appellee, as the same remain on record and on file in my office as the Clerk of said Court.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of Honolulu, in the Territory of Hawaii, this 18th day of January in the year of Our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundredth and twenty-ninth.

[SEAL.] HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 20,075. Hawaii Territory supreme court. Term No. 195. Frederick J. Lowrey, George P. Castle, and William O. Smith, trustees, appellants, *vs.* The Territory of Hawaii. Filed February 1st, 1906. File No. 20,075.